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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1296

BERTY JEAN TYSON, *Petitioner*

v.

VIRGIN ISLANDS NATIONAL BANK, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1236

BETTY JEAN TYSON, *Petitioner*

v.

VIRGIN ISLANDS NATIONAL BANK, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

The Virgin Islands National Bank, the Respondent herein, prays that the Petition for Writ of Certiorari be denied.

JURISDICTION

Petitioner's statement as to this Court's jurisdiction to hear the Petition is accepted. It is Respondent's contention, however, that the case does not fall within the guidelines set forth in Rule 19, Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

Petitioner's statement of questions presented are not acceptable in the form in which set forth; they are argumentative and set forth conclusions not supported by the facts. We would restate each one as follows:

1. Did the District Court abuse its discretion in confirming a judicial sale without a hearing where the judgment debtor failed to file objections to the sale as required by local statute?

2. Was there denial of due process by reason of the foregoing proceedings?

3. Was there an abuse of discretion by the District Court or the Court of Appeals in denying relief under Rule 60(b) Federal Rules of Civil Procedure?

STATEMENT

The first portion of the opinion of the Court of Appeals fairly states the basic facts of this case, and it appears unnecessary to burden the Court with a further Statement, except for one salient addition: the Motion to Confirm Sale was served not only on Petitioner but also upon her then attorney of record; no response or opposition to the Motion was filed by Petitioner or her counsel.

ARGUMENT

I. Respondent respectfully suggests that the Petitioner has not presented to this Court a substantial Federal question.

The orders of the District Court of the Virgin Islands, as affirmed by the Court of Appeals, do not present (a) a matter of conflict of decisions between Circuits, (b) a significant constitutional question, nor (c)

a matter of substantial public interest. The District Court of the Virgin Islands, after hearing testimony from both sides on March 4, 1974, found that Petitioner's Motion to set aside the sale should be denied. The Court of Appeals, after reviewing the record and the transcript of March 4, 1974 hearing, found no abuse of discretion and additionally, although raised for the first time in the Court of Appeals, that no relief should be granted Petitioner under Rule 60(b), Federal Rules of Civil Procedure. The case is of great concern to the parties only and involves no broad issues of law, public policy or public interest.

II. Since Petitioner has raised the question of her lack of opportunity to be heard, several matters should be pointed out which are implicit whether one reads Petitioner's Statement of the case or the facts as set forth in the Court of Appeals opinion:

1. Petitioner's first attempt to question the judgment of the District Court came on January 8, 1974, about one and one-half (1½) years after the judgment was entered.

2. Petitioner did not make objection to the judicial sale as required by 5 VIC 489(1). Petitioner's Brief characterizes this statutory requirement as setting "too high a standard for an unrepresented litigant". In this connection, it should be stated that Petitioner did not even attend the judicial sale although she had both actual and constructive knowledge of such.

3. Although Petitioner admits being served with the Motion to Confirm Sale on July 10, 1973, neither the Petitioner nor her then counsel of record, who was also served, made any response or filed any opposition to the Motion. Neither party to this action was aware

of the prior signing of the Order until July 16, 1973 when such was announced by the District Judge in open court. Had there been objections to the sale, as required by statute, it must be assumed that the Court would not have signed the Order. Had there been response or opposition to the Motion to Confirm Sale, the Court would unquestionably have set aside the Order and proceeded to hearing. This is simply one further instance of Petitioner's insistence upon her rights and, at the same time, ignoring her obligations. Since foreclosure is an equitable proceeding, we are persuaded to comment that Petitioner, as well as Respondent, is subject to the "clean hands doctrine".

4. Assuming, *arguendo,* that 5 VIC 489(1) is hard on an "unrepresented litigant", it should be noted that Petitioner did not move to vacate the Order Confirming Sale; nor did she, within the thirty (30) days allowed, appeal to the Court of Appeals.

5. Although Petitioner's Motion to Reopen Case and Amended Judgment was denied on February 12, 1974, she failed to appeal from that Order but filed another Motion. In both instances she was represented by counsel.

6. The foregoing points were basis for a Motion to Dismiss the appeal to the Court of Appeals; decision on that Motion was held in abeyance until "submission of the case to the panel". The Court of Appeals heard Petitioner on the merits.

III. Although we regard it as quite peripheral, the Petitioner's claims of being an "unrepresented litigant" must be answered. Petitioner has been represented by two different attorneys in the District Court and by her present counsel on an appeal to the Court

of Appeals and the Petition before this Court. If at any time she was unrepresented, it was of her own volition. In any event, the statutes and rules must apply to all.

IV. Also peripheral is Petitioner's claim that both the District Court and the Court of Appeals ignored the judicial precedent of *Lucerne Investment Company* v. *Estate Belvedere, Inc.*, 7 V.I. 275 (Dist. Ct. of V.I., 1969) The Courts could not do otherwise; on March 6, 1974 the District Court, in *Mt. Washington Estates* v. *Brumick Corporation* (D.C.V.I., Civil No. 484/1973) stated as follows in commenting on Lucerne:

> "I should note, however, that this is the exception, and not the rule. The special circumstances present in this case will seldom recur. Moreover, the relaxation of the five day rule suggested by *Lucerne* is not to be relied upon generally. The objections in that case, although not within the five-day period, did precede the petition for confirmation and this consideration seems critical in arriving at the conclusion that 'interests of justice' demand consideration of the objection."

V. We respectfully suggest that there was no abuse of discretion by the Court of Appeals in denying relief under Rule 60(b), Federal Rules of Civil Procedure. *Klapprott* v. *United States,* 335 U.S. 601 would not appear to provide Petitioner with an argument for relief; the case was ultimately remanded and Klapprott was denied relief. However, in *Ackerman* v. *United States,* 340 U.S. 193, the Supreme Court indicated that Ackerman was not entitled to relief under Rule 60(b) although he was without funds and in detention at a time when he should have appealed; the Court said the case did not present the "extraordinary circum-

stances" required for relief. The following comment from Wright and Miller, *Federal Practice and Procedure,* Vol. 11, Section 2864, would appear to be relevant to this Petition:

> "The broad power granted by Clause (6) is not for the purpose of relieving a party from free calculated and deliberate choices he has made. A party remains under a duty to take legal steps to protect his own interests. In particular, it is not permissible to use this motion to remedy a failure to take an appeal."

Petitioner could have appealed the Judgment, objected to the judicial sale, moved to vacate the Order Confirming Sale, or appealed from the Order Confirming Sale. Petitioner did none of these things. Petitioner's claims of lack of notice and opportunity to be heard are quite groundless, and the case does not present the extraordinary circumstances required to invoke Rule 60(b).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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